STATE OF MICHIGAN

IN THE SUPREME COURT

KIRT BIERLEIN, Conservator for
SAMANTHA C. BIERLEIN, a Minor,
and NORMA R. BIERLEIN, as Next Friend
of SAMANTHA C. BIERLEIN, a Minor,

Plaintiffs/Appellants,

vs.

Supreme Court Docket No: 128913
Court of Appeals Docket No: 259519
Lower Court Case No: 96-013292-NI

MARK SCHNEIDER and MARY
SCHNEIDER, Jointly and Severally,

Defendants/Appellees.

BRIEF OFAPPELLEES MARK SCHNEIDER and MARY SCHNEIDER

ORAL ARGUMENT REQUESTED

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QUESTION I

WHERE THE ISSUED RAISED BY THIS APPEAL HAS ALREADY BEEN RESOLVED BY THE COURT OF APPEALS DECISION IN *BIERLEIN I*, IS THIS APPEAL BARRED BY THE LAW OF THE CASE DOCTRINE?

Plaintiff/Appellant answers this question "No"

Defendants/Appellees answer this question "Yes"

The trial court did not address this question

The Court of Appeals did not expressly address this question

QUESTION II

DO THE PROVISIONS OF MCR 2.612(C)(1)(a) ENTITLE THE PLAINTIFFS TO AN ORDER SETTING ASIDE THE DISMISSAL AND COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME, WHERE (1) PLAINTIFFS' MOTION FOR RELIEF WAS FILED BEYOND THE ONE YEAR PERIOD OF TIME ALLOWED BY MCR 2.612(C)(2), AND WAS THEREFORE UNTIMELY, AND (2) PLAINTIFF HAS FAILED TO SATISFY THE REQUIREMENTS FOR RELIEF UNDER MCR 2.612(C)(1)(a)?

Plaintiff/Appellant answers this question "Yes"

Defendants/Appellees answer this question "No"

The trial court answered this question "No"

In *Bierlein I*, the Court of Appeals answered this question "No"

QUESTION III

WAS THE DISMISSAL OF THIS CASE ON JULY 28, 1997 VOID WITHIN THE MEANING OF MCR 2.612(C)(1)(d)?

Plaintiff/Appellant answers this question "Yes"

Defendants/Appellees answer this question "No"

The trial court answered this question "No"

In *Bierlein I*, the Court of Appeals answered this question "No"

QUESTION IV

DO THE PROVISIONS OF MCR 2.612(C)(1)(f) ENTITLE THE PLAINTIFFS TO AN ORDER SETTING ASIDE THE DISMISSAL AND COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME?

Plaintiff/Appellant answers this question "Yes"

Defendants/Appellees answer this question "No"

The trial court answered this question "No"

In *Bierlein I*, the Court of Appeals answered this question "No"

QUESTION V

SHOULD THE DISMISSAL IN THIS CASE BE SET ASIDE AND THE SETTLEMENT REOPENED PURSUANT TO MCR 7.316(A)(7)?

Plaintiff/Appellant answers this question "Yes"

Defendants/Appellees answer this question "No"

The trial court answered this question "No"

The Court of Appeals did not expressly address this question

COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

A. Introduction

This is the second time the plaintiff has appealed this matter. The first appeal was Court of Appeals Docket # 242547 (hereafter referred to as "*Bierlein I*"), and involved the same issue as is involved in the instant appeal. As stated in the Court of Appeals' order granting leave to appeal in *Bierlein I*, one of the issues in that appeal was what relief, *if any*, should be granted if there was a violation of MCR 2.420(B)(4). (Appellees' Appendix, 52b). Indeed, the Court of Appeals *specifically directed* the parties to brief that issue in *Bierlein I*. In *Bierlein I*, the Plaintiff simply took the position that the appropriate relief was to completely vacate the settlement (a settlement which the Defendants had already paid) and reinstate the case, and did not offer the Court of Appeals any other alternate form of relief. The Plaintiff never claimed (as she now claims) that one form of relief would be to compel the Defendants to pay the settlement *a second time*. *Bierlein I* was resolved in an opinion issued by the Court of Appeals on January 20, 2004, in which the Court of Appeals rejected the relief sought by the Plaintiff. In the instant appeal, the Plaintiffs/Appellants again asked the Court of Appeals (and now asks this Court) to address what relief should be granted if there was a violation of MCR 2.420(B)(4). The only difference between the instant appeal and *Bierlein I* is the relief sought by the Plaintiffs/Appellants. The Plaintiffs/Appellants now claim that the appropriate relief would be to compel the Defendants to pay the settlement again. As will be discussed below, the Plaintiffs/Appellants had a full opportunity to brief this issue in *Bierlein I*, and indeed all parties were directed to brief the issue relating to the appropriate relief (if any). Instead, the Plaintiffs chose to litigate this issue on a piecemeal basis. Having failed to raise this theory in *Bierlein I*, the Plaintiffs should not be allowed to raise this issue now. Nonetheless, as will also be discussed in the Argument section of this Brief, in *Bierlein I* the Court of Appeals specifically rejected as unfair the relief now requested by the Plaintiffs/Appellants.

B. Chronology of Bierlein I

This is a personal injury lawsuit, arising out of an automobile accident which occurred on May 31, 1995. The minor-plaintiff, Samantha C. Bierlein brought suit through her Next Friend, Norma Bierlein. This case was ultimately settled for the amount of $55,000.00 which was approved by the trial court on July 28, 1997. On June 21, 2002, the trial court entered an order re-opening the settlement for re-evaluation, after it became apparent that Plaintiff's counsel never turned over the settlement proceeds to the Plaintiff, and apparently stole those settlement proceeds. Defendants appealed from the lower court order which reopened the settlement of this matter.

As noted above, this matter was settled for the total amount of $55,000.00, in July, 1997. On July 28, 1997, the parties appeared in Saginaw County Circuit Court in order to obtain court approval of the settlement. (Appellant's Appendix, 4a). Honorable Peter Meter was the presiding judge. Norma Bierlein, the Plaintiff's mother and Next Friend, gave testimony in support of the settlement (Appellant's Appendix, 6a-13a). Judge Meter was given a copy of medical reports regarding the minor-plaintiff's condition, including reports from the minor-plaintiff's speech therapist. (Appellant's Appendix, 13a). The nature of the child's past medical treatment was placed on the record. (Appellant's Appendix, 7a-11a). Judge Meter specifically asked the child's mother whether any of the child's injuries were still visible, to which Ms. Bierlein replied that the child had a two inch scar on the left side of her scalp which was covered by her hair. (Appellant's Appendix, 11a). During the questioning of Norma Bierlein, Judge Meter specifically inquired into the minor-child's speaking and thinking abilities. (Appellant's Appendix, 11a-12a).

During the July 28, 1997 proceeding, defense counsel showed Ms. Bierlein a copy of the Release of All Claims, which she had signed. (Appellant's Appendix, 10a). She agreed that the Release bore her signature, and she further agreed that signed the Release of her own free will. (Appellant's Appendix, 10a). Ms. Bierlein testified that she understood that by signing the Release

she was releasing the Defendants of any liability. (Appellant's Appendix, 10a-11a). Ms. Bierlein also testified that she felt that the settlement was in the best interests of her daughter. (Appellant's Appendix, 11a).

At the conclusion of the hearing, the court approved the settlement. (Appellant's Appendix, 13a-14a). After he approved the settlement, the judge stated, ". . . I take it a conservator has been appointed." (Appellant's Appendix, 14a). In response, counsel for the Plaintiff stated, "There will be one very shortly." (Appellant's Appendix, 14a). With this assurance from Plaintiff's counsel, the court stated, "And the court will sign all orders at this time." (Appellant's Appendix, 14a). At that point, the court signed the order approving the settlement. (Appellant's Appendix, 14a).

On the day of the motion hearing, Norma Bierlein signed a Release of All Claims. (Appellees' Appendix, 1b). In that Release, Ms. Bierlein expressly represented that the $55,000 settlement amount had been "to me in hand paid and receipt of which is hereby acknowledged. . ." (Appellees' Appendix, 1b). A copy of the settlement draft, bearing an endorsement by Norma Bierlein is contained in Appellees' Appendix. (Appellees' Appendix, 4b).

In approximately April of 2001, Plaintiff Norma Bierlein apparently advised the lower court that she never received the settlement proceeds from her counsel. Accordingly, the lower court scheduled a Show Cause Hearing for May 1, 2001, presided over by Honorable Fred L. Borchard, in order to inquire into the disposition of the settlement proceeds. (Appellant's Appendix, 19a-27a). Norma Bierlein and her counsel both appeared for that hearing. At that time, Ms. Bierlein advised the court that she had been trying to contact her attorney in order to determine where the settlement proceeds were. (Appellant's Appendix, 20a). The court observed that the file did not contain an Order of Distribution of the Settlement Proceeds, and that the Probate Court did not have a file on this matter. (Appellant's Appendix, 22a, 23a). Plaintiff's counsel stated that he had been trying to locate his file, unsuccessfully. (Appellant's Appendix, 22a). He further claimed that, in the past, he

would use another firm in order to secure appointment of a conservator. (Appellant's Appendix, 22a). Plaintiff's counsel claimed that he did not know what happened to the settlement proceeds. (Appellant's Appendix, 22a-24a).

Plaintiff's counsel asked the court to give him until the following Monday in order to report to the court. (Appellant's Appendix, 26a). The court granted this request. (Appellant's Appendix, 26a-27a).

On May 7, 2001, the lower court conducted a Continued Show Cause Hearing regarding the location of the settlement proceedings. (Appellant's Appendix, 29a-47a). Once again, Honorable Fred L. Borchard presided over the proceedings, and Norma Bierlein and her counsel appeared for the hearing. During that hearing, Ms. Bierlein testified that a Conservator was never appointed for her minor-daughter, **even though and her husband had understood that she would be appointed Conservator**. (Appellant's Appendix, 34a). She further testified that when she signed the Release papers in the offices of her attorney, **there was a check attached to the top**. (Appellant's Appendix, 34a). She testified that her attorney told her that the proceeds would be deposited in a high interest bearing account, that she could not worry about it, and that he would take care of it. (Appellant's Appendix, 34a-35a). She was not sure whether she had signed the settlement check. (Appellant's Appendix, 35a).

During the May 7, 2001 hearing, the court also asked Plaintiff's counsel to bring the court up-to-date regarding the current location of the settlement proceeds. (Appellant's Appendix, 35a). In response, Plaintiff counsel claimed that he was taking steps to try and determine the current location of the proceeds. (Appellant's Appendix, 35a-36a). Plaintiff's counsel claimed that the settlement proceeds would have been sent to an investment firm, and that the person who would have been in charge of opening the account would have been an individual by the name of Rex Fitzgerald. (Appellant's Appendix, 37a). Plaintiff's counsel also claimed that Mr. Fitzgerald was no

longer in the phone book. (Appellant's Appendix, 37a). Plaintiff's counsel also claimed that he could not locate his file. (Appellant's Appendix, 37a). He stated that there had been some water damage at the file storage location, and that it was necessary to destroy the stored files. (Appellant's Appendix, 37a).

The Court ultimately determined that a further show cause hearing should be conducted within 30 days. (Appellant's Appendix, 46a).

On May 10, 2001, the lower court issued an "Order Re-Opening Nunc Pro Tunc" re-opening this case. (Appellant's Appendix, 49a). As of that date, the court did not set aside the settlement itself, but merely set aside the order of dismissal.

On May 17, 2001, the lower court issued an order appointing attorney David B. Meyer (current counsel of record for Plaintiff/Appellant) as the Guardian Ad Litem for the minor child, "for the purpose of an investigation concerning the settlement which occurred on July 28, 1997..." (Appellant's Appendix, 52a). The order instructed Mr. Meyer to "prepare a report and recommendation concerning the settlement and the whereabouts of any proceeds from that settlement by June 17, 2001." (Appellant's Appendix, 52a).

On June 6, 2001, the lower court conducted a Continued Show Cause Hearing regarding the whereabouts of the settlement proceeds. (Appellant's Appendix, 57a). These proceedings were attended by attorneys Gerald V. Padilla and Timothy A. Dinan (attorneys for the Defendants), William A. Brisbois (an attorney who had been retained to represent Plaintiff's previous counsel), and Norma Bierlein. (Appellant's Appendix, 59a). Mr. Brisbois advised the court that Mr. Collison, Plaintiff's previous counsel was incapacitated and would not be able to attend. (Appellant's Appendix, 59a). During the course of the hearing, the lower court placed on the record that Plaintiff's previous attorney ran his car into a tree at a high rate of speed after the last hearing.

(Appellant's Appendix, 66a). The court further stated that there was an on-going criminal investigation by the Michigan State Police. (Appellant's Appendix, 67a).

A copy of the endorsed settlement draft was produced by defense counsel for purposes of the Show Cause Hearing. (Appellant's Appendix, 68a; Appellees' Appendix, 4b). Upon reviewing that copy, Ms. Bierlein stated that she did not believe that the endorsement on the check was in her handwriting. (Appellant's Appendix, 68a).

During the course of this hearing, the lower court particularly expressed its concern that this case had been dismissed before a Conservator had been appointed. (Appellant's Appendix, 69a). The hearing was ultimately adjourned, pending receipt of the report and recommendation from the Guardian Ad Litem. (Appellant's Appendix, 81a).

On June 15, 2001, the Guardian Ad Litem issued his report and recommendation. (Appellees' Appendix, 5b). In his report, the Guardian Ad Litem did not in any way suggest that the settlement should be further examined or set aside. (Appellees' Appendix, 5b-9b).

On June 22, 2001, the Defendants filed a Motion for Re-Hearing or to Alter or Amend the court's Previous Order of May 10, 2001. (Appellees' Appendix, 12b). On July 26, 2001, the lower court entered an Order denying Defendants' Motion for Re-Hearing or to Alter or Amend. (Appellees' Appendix, 23b). The Order also provided, however, that steps must be taken for the appointment of a Conservator for the minor-child, and further that an Application must be made to the Michigan Client Protection Fund of the State Bar of Michigan. (Appellees' Appendix, 23b).

A Conservator was subsequently appointed on behalf of the minor-plaintiff. On March 5, 2002, the Conservator filed a Motion to Re-Open the Trial Court Proceedings and to Re-Evaluate the Settlement Terms. (Appellees' Appendix, 25b). The Defendants opposed that motion. (Appellees' Appendix, 47b). The lower court took the Conservator's motion under advisement and, on June 21,

2002, issued an Opinion and Order granting the Motion to Re-Open the Settlement Terms Proceedings. (Appellant's Appendix, 130a).

These Defendants filed a timely Application for Leave to Appeal to the Court of Appeals. On October 25, 2002, the Court of Appeals issued an Order granting the Application for Leave to Appeal. (Appellees' Appendix, 52b). In that order, the Court of Appeals specifically *directed* the parties to address not only the issues raised in the Application for Leave to Appeal, but also "**what relief, if any, is appropriate in this matter.**" (Appellees' Appendix, 52b)(emphasis added).

On January 20, 2004, the Court of Appeals issued an opinion ruling that the lower court had erred by setting aside the settlement, because the requirements of MCR 2.612(C)(1) were not met. Significantly, the Court of Appeals also ruled as follows:

> "**[D]efendants' rights would be detrimentally affected if the original satisfaction is set aside** since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." (Appellant's Appendix, 137a)(emphasis added).

The Court of Appeals further noted that the result which the Plaintiffs now complain of were a result of the Plaintiff next friend's own actions:

> "The settlement here was on the record, the judge approved it, and the next friend agreed to the amount. Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement. When a party's own actions caused the result, courts are reluctant to grant that party relief under 2.612(C)(1)(f)." (Appellant's Appendix, 137a).

The Court of Appeals remanded this case to the lower court for proceedings consistent with the Court's opinion.

C. Post-Remand Proceedings

For more than seven months after the remand of this matter, the Plaintiffs made no claim that they were entitled to any further relief. Indeed, Plaintiffs made no such claims until after the

Defendants filed a motion in the lower court to reinstate the dismissal of this case. (Appellant's Appendix, 138a). On or about August 4, 2004, the Plaintiffs filed a "Motion to Enforce Settlement." (Appellant's Appendix, 141a). Although designated as a motion to "enforce" the settlement, the Plaintiffs implicitly asked the lower court to set aside Defendants previous satisfaction of the settlement. In their motion, the Plaintiffs requested that the lower court order the Defendants to once again pay the settlement amount, together with interest accruing since July 28, 1997. (Appellant's Appendix, 141a).

After entertaining oral argument, the lower court granted Defendants motion to reinstate the dismissal, and denied Plaintiffs "Motion to Enforce Settlement." (Appellant's Appendix, 146a).

Plaintiffs/Appellants sought leave to appeal from the Court of Appeals from the lower court's November 15, 2004 "Order Reinstating Dismissal Pursuant to Court of Appeals Opinion and Denying Plaintiff's motion for Enforcement of Settlement." On May 12, 2005, the Court of Appeals denied Plaintiff's application "for lack of merit in the grounds presented." (Appellant's Appendix, 148a)

On June 16, 2005, the Plaintiffs/Appellants filed an application for leave to appeal to this Court. On December 28, 2005, this Court ordered oral arguments as to whether leave, or other peremptory action, should be granted. This Court heard oral arguments on April 6, 2006. On April 14, 2006, this Court granted leave to appeal.

ARGUMENT I

THE ISSUED RAISED BY THIS APPEAL HAS ALREADY BEEN RESOLVED BY THE COURT OF APPEALS DECISION IN *BIERLEIN I*, AND THEREFORE THIS APPEAL IS BARRED BY THE LAW OF THE CASE DOCTRINE.

A. Standard of Review

Whether the doctrine of law of the case applies is a question of law subject to de novo review. *Ashker v. Ford Motor Co*, 245 Mich.App 9, 13, 627 NW2d 1 (2001).

B. This Appeal Is Barred by the Law of the Case

As in the Court of Appeals, the "law of the case" doctrine dispenses with the need for this Court to consider legal questions decided by the Court of Appeals in an earlier appeal of this same case. As generally stated, the doctrine is that if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. *CAF Investment Co. v. Saginaw Twp.*, 410 Mich. 428, 454, 302 N.W.2d 164 (1981). The primary purpose of the doctrine is to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit. *Ashker ex rel. Estate of Ashker v. Ford Motor Co.*, 245 Mich.App. 9, 13, 627 N.W.2d 1, 3 (2001); *Bennett v. Bennett*, 197 Mich.App. 497, 499-500, 496 N.W.2d 353 (1992). The doctrine applies where a subsequent proceeding involves the same set of facts, the same parties, and the same question of law as the previous appeal. *Manistee v. Manistee Firefighters Ass'n*, 174 Mich.App 118, 125, 435 NW2d 778 (1989).

These principles are directly applicable to this case. Not only does the instant case involve the precisely the same facts and the same parties as *Bierlein I*, but also this case involves the same issue of law. The alleged misconduct which was the subject of *Bierlein I* is precisely the same

alleged misconduct which is the subject of this appeal, i.e., paying the settlement proceeds to Plaintiff minor's next friend and attorney prior to the appointment of a conservator. Moreover, when the Court of Appeals granted leave to appeal in *Bierlein I*, it specifically *directed* all of the parties (not merely the Defendants) to address not only the issues raised in the Application for Leave to Appeal, but also "what relief, if any, is appropriate in this matter." (Appellees' Appendix, 52b). Given the Court of Appeals' *explicit directive*, the Plaintiffs did not have the option to strategically hold some of their theories of relief *in reserve*, and litigate those theories on a piece-meal basis in successive appeals. Rather, the Plaintiffs had an obligation to the Court of Appeals to present all of their arguments in a thorough fashion, even if this meant presenting those arguments as alternative theories of relief. The Plaintiffs have not, and cannot, explain why their current theory of relief could not have been presented during *Bierlein I*, as the Court of Appeals directed. Having failed to raise this theory of relief in *Bierlein I*, the Plaintiff should not be allowed to raise this issue now.

ARGUMENT II

THE PROVISIONS OF MCR 2.612(C)(1)(a) DO NOT ENTITLE THE PLAINTIFFS TO AN ORDER SETTING ASIDE THE DISMISSAL AND COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME, WHERE (1) PLAINTIFFS' MOTION FOR RELIEF WAS FILED BEYOND THE ONE YEAR PERIOD OF TIME ALLOWED BY MCR 2.612(C)(2), AND WAS THEREFORE UNTIMELY, AND (2) PLAINTIFF HAS FAILED TO SATISFY THE REQUIREMENTS FOR RELIEF UNDER MCR 2.612(C)(1)(a).

A. Standard of Review

A trial court's decision on a motion to set aside a proceeding under MCR 2.612(C) is reviewed under the abuse of discretion standard. *Vestevich v. West Bloomfield Tp.*, 245 Mich. App. 759, 630 N.W.2d 646 (2001); *Trendell v. Solomon*, 178 Mich. App. 365, 369-370, 443 N.W.2d 509 (1989).

B. Analysis

On the instant appeal, as in *Bierlein I*, this Court is asked to review a decision as to what relief, *if any*, should be granted for the alleged violation of MCR 2.420(B)(4). In *Bierlein I*, the Court of Appeals considered three possible bases for Plaintiff's challenge to the dismissal of this case:

(a) Mistake (MCR 2.612(C)(1)(a)).

(b) Fraud or other misconduct (MCR 2.612(C)(1)(c)).

(c) Any other reason justifying relief from the operation of the judgment (MCR 2.612(C)(1)(f)).

(Appellant's Appendix, 136a).

Pursuant to MCR 2.612(C)(2), a motion based upon any MCR 2.612(C)(1)(a) - (c) must be filed within one year after the judgment, order or proceeding was entered. In the instant case, Plaintiff's motion to re-open the settlement, and to set it aside, was untimely. As indicated in the Counter-

Statement of Facts, it was not until March 5, 2002 that the Conservator filed a Motion to Re-Open the Trial Court Proceedings and to Re-Evaluate the Settlement Terms. (Appellant's Appendix, 102a). Additionally, it was not until August, 2004 (more than seven months following the remand which resulted from *Bierlein I*) that the Plaintiffs *once again* sought to vacate Defendants' previous satisfaction of the settlement,[1] and to compel the Defendants to pay the settlement a second time. The deadline specified by MCR 2.612(C)(2) therefore expired long before the Plaintiff sought any relief from the court approved settlement. More specifically, the deadline specified by MCR 2.612(C)(2) expired on July 28, 1998, **more than three years and seven months before the Plaintiff/Appellant challenged the dismissal of the action and the validity of Defendant/Appellees' satisfaction of the settlement**. Importantly, MCR 2.612(C)(2) does not give the trial court any discretion to disregard the one year deadline. Rather, the rule is quite specific in stating that the motion "must be made" within one year. Given the undisputed fact that Plaintiff's motion was filed well beyond that time, the trial court had no discretion to grant Plaintiff's motion to compel the Defendants to pay the settlement a second time.

Quite apart from the issue of timeliness, none of the cases cited by the Plaintiffs supports their claim that the Defendants had either the right or obligation to withhold payment until the probate court appointed a conservator. In the case of *Commire v. Automobile Club of Michigan*, 183 Mich App 299, 454 NW2d 248 (1990), the claimant did not file suit prior to the settlement. It is quite clear from the Court of Appeals' opinion that this settlement took place prior to any suit being instituted. Moreover, there is no evidence whatsoever that the settlement was approved by any court. Accordingly, application of MCR 2.420 simply was not at issue in *Commire*, for the obvious reason that MCR 2.420 only applies to cases that are in suit. In short, the *Commire* decision has no relevance to the instant case.

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1 Defendants' satisfaction of the settlement was implicitly set aside when the lower court entered the June 21, 2002 order

The case of *Smith v. YMCA of Benton Harbor*, 216 Mich App 552, 550 NW2d 262 (1996) is similarly irrelevant to the instant case. Once again, as in *Commire*, the settlement in *Smith* took place prior to any litigation being instituted. As in *Commire*, application of MCR 2.420 was not at issue. Similarly, as in *Commire*, there is no suggestion that the settlement was ever subjected to court approval. The issue in *Smith* was not whether the defendant properly *paid* the settlement prior to appointment of a conservator. Rather, **the issue was whether the settlement was valid at all**. More specifically, the issue was whether or not a parent has authority to enter into a valid and binding settlement for his or her child, *absent court approval of the settlement*. The Court of Appeals ultimately held that court approval is required for such a settlement. The Court of Appeals did not hold that, after the court has approved the settlement, the payor has the right or obligation to delay payment until after a conservator has been appointed. Unlike the situation in *Smith*, the Plaintiff minor in the instant case was at all times represented by a next friend, and the settlement was approved by the lower court after a hearing. In short, the holding in *Smith* has no applicability to the facts of this case.

The case of In re *Contempt of Auto Club Insurance Association*, 243 Mich App 697, 624 NW2d 443 (2001) does not at all support Plaintiff's argument that the lower court should have vacated Defendants' satisfaction of the settlement, and compelled the Defendants to repay that settlement. Quite the contrary, **the Court of Appeals ultimately disapproved of the defendant's and defense counsel's refusal to pay the settlement until a conservator was appointed**. In that case, the Court of Appeals never held that the settlement payor had the obligation to ensure that a conservator was appointed for the minor. Moreover, the Court of Appeals did not hold that the payor had the right or obligation to withhold payment until a conservator was appointed. Instead, the Court of Appeals merely stated its belief that *Plaintiff's next friend* had the obligation to open a

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reopening the settlement.

probate estate. Significantly, the Court of Appeals did not approve of the insurer's insistence upon delaying payment until after the appointment of a conservator. Rather, the Court of Appeals characterized the case as one where "the lawyers' zest for legal combat overwhelmed their common sense," and where *both* the payor and Plaintiff's counsel were "stubborn." In re *Contempt of Auto Club Insurance Association*, *supra*, at 699. In short, although the Court of Appeals stated that the insurer's legal position was legally correct, the Court of Appeals never held that the insurer had either the right or obligation to withhold payment pending appointment of a conservator. Instead, the Court of Appeals was merely making the point that the insurer was legally correct in its position that the *next friend* had the obligation to seek appointment of a conservator.

Finally, the case of *Bowden v. Hutzel Hospital*, 252 Mich. App. 566, 652 N.W.2d 529 (2002) is both factually and legally distinguishable from the facts of this case. Moreover, in *Bowden*, the Court of Appeals was not asked to address the issue raised by the Plaintiffs on the instant appeal. In *Bowden*, unlike the instant case, the plaintiffs claimed that the trial court had failed to conduct a hearing to determine whether the proposed settlement was in the best interests of the minor child. By contrast, in the instant case, the trial court did in fact hold such a hearing, as discussed in Appellees' Counter-Statement of Facts. Furthermore, the Plaintiffs in this case have never presented any evidence that the settlement was not in the child's best interests. Indeed, the Plaintiffs themselves concede that this issue "is now at rest." (Plaintiff/Appellants' Brief, p. 12). The thrust of the instant appeal is that Plaintiffs' original counsel stole the settlement money, and the Plaintiffs want the Defendants to pay the settlement a second time. Unlike *Bowden*, there is no question here as to whether the settlement was in the child's best interests.

Furthermore, in *Bowden*, the child's guardian withdrew his approval of the settlement before it was approved by the court, and discharged plaintiff's counsel. Apparently refusing to heed the wishes of his client, and with the court's knowledge that the plaintiffs wished to have new counsel,

plaintiff's original counsel nonetheless proceeded with a motion to have the settlement approved. The court granted the motion for approval of settlement, without any hearing. Based upon the facts recited in the *Bowden*, the defendants in that case should have been fully aware of the plaintiffs' withdrawal of approval of the settlement, and their desire for new counsel. There is no indication that the defendants ever paid the settlement. The plaintiffs in *Bowden* were not asking that the defendants be required to pay the settlement *a second time*. Accordingly, the defendants in *Bowden* could make no credible claim of detrimental reliance. All of these facts are in marked contrast to the instant case. In the instant case, the Plaintiff's mother never withdrew authorization for the settlement, but in fact appeared in court in order to support approval of the settlement. Furthermore, the Defendants in this case paid the settlement amount long ago, and would therefore be unfairly prejudiced if they were required to pay the settlement again.

For all of the foregoing reasons, the Court of Appeals and the trial court (on remand) properly held that the dismissal, and Defendant's satisfaction of the settlement, should not be set aside under MCR 2.612(C)(1)(a). Any claim for relief under that rule was untimely, because it was filed long after the expiration of the deadline specified in MCR 2.612(C)(2). Furthermore, the Plaintiffs/Appellants have failed to demonstrate that the Defendants/Appellees had either the right or obligation to withhold payment until the probate court appointed a conservator.

ARGUMENT III

THE DISMISSAL OF THIS CASE WAS NOT VOID WITHIN THE MEANING OF MCR 2.612(C)(1)(d).

A. Standard of Review

A trial court's decision on a motion to set aside a proceeding under MCR 2.612(C) is reviewed under the abuse of discretion standard. *Vestevich v. West Bloomfield Tp.*, 245 Mich. App. 759, 630 N.W.2d 646 (2001); *Trendell v. Solomon*, 178 Mich. App. 365, 369-370, 443 N.W.2d 509 (1989).

B. Analysis

In an apparent effort to avoid the one year deadline prescribed by MCR 2.612(C)(2), the Plaintiff argues that the dismissal of this case was "void" within the meaning of MCR 2.612(C)(1)(d). There is, however, absolutely no basis for this claim. As one Michigan authority has recognized:

> "A judgment is 'void' only if it is beyond the power of the court to render. In general, that will be the case only if the court lacked jurisdiction over the person or over the subject matter of the action." Dean & Longhofer, *Michigan Court Rules Practice*, Vol. 3, p. 479.

It is undisputed that no conservator had been appointed, and no bond had been approved by or filed with the probate court, at the time the lower court approved the settlement and entered the order of dismissal. These circumstances did not, however, deprive the lower court of subject matter jurisdiction to approve the settlement and enter the order of dismissal.

Subject-matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case. *Travelers Ins. Co. v. Detroit Edison Co.*, 465 Mich. 185, 204, 631 N.W.2d 733, 744 (2001); *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998). Stated another way, subject matter jurisdiction is the right of the court to exercise judicial power over that class of cases, not the particular case before

it. *Bowie v. Arder*, 441 Mich. 23, 36, 39, 490 NW2d 568 (1992); *In re AMB*, 248 Mich.App. 144, 166-167, 640 N.W.2d 262 (2001); *Derderian v. Genesys Health Care Systems*, 263 Mich.App. 364, 375, 689 N.W.2d 145, 154 (2004).

A lack of subject matter jurisdiction must be distinguished from an error in the exercise of a court's jurisdiction. *Bowie v. Arder*, 441 Mich. 23, 40, 56, 490 N.W.2d 568, 576 (1992); *Altman v. Nelson*, 197 Mich.App. 467, 473, 495 N.W.2d 826, 829 (1992). This Court recognized this distinction long ago, as follows:

> "The loose practice has grown up, even in some opinions, of saying that a court had no 'jurisdiction' to take certain legal action when what is actually meant is that the court had no legal 'right' to take the action, that it was in error. If the loose meaning were correct it would reduce the doctrine of res judicata to a shambles and provoke endless litigation, since any decree or judgment of an erring tribunal would be a mere nullity." *Buczkowski v. Buczkowski*, 351 Mich. 216, 222, 88 N.W.2d 416 (1958), *quoted with approval in Bowie v. Arder*, 441 Mich. 23, 40, 490 N.W.2d 568, 576 (1992) *and Altman v. Nelson*, 197 Mich.App. 467, 473, 495 N.W.2d 826, 829 (1992).

The Court of Appeals has expressed the same concept of subject matter jurisdiction, as follows:

> "There is a wide difference between a want of jurisdiction, in which case the court has no power to adjudicate at all, and a mistake in the exercise of undoubted jurisdiction, in which case the action of the trial court is not void, although it may be subject to direct attack on appeal.
>
> . . . .
>
> Where jurisdiction of the subject matter and the parties exist, errors or irregularities in the proceedings, however grave, although they may render the judgment erroneous and subject to be set aside in a proper proceeding for that purpose, do not render the judgment void; until the judgment is set aside, it is valid and binding for all purposes and cannot be collaterally attacked. Once jurisdiction of the subject matter and the parties is established, any error in the determination of questions of law or fact upon which the court's jurisdiction in the particular case depends is error in the exercise of jurisdiction. Jurisdiction to make a determination is not dependent upon the

correctness of the determination made.

> If the court has jurisdiction of the parties and of the subject matter, it also has jurisdiction to make an error." *Altman v. Nelson*, 197 Mich.App. 467, 472-473, 495 N.W.2d 826, 829 (1992).

Michigan circuit courts derive their subject matter jurisdiction from the Michigan Constitution and statutes. The Michigan Constitution vests the circuit court with broad original jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law. In particular, the Michigan Constitution provides that: "The circuit court shall have original jurisdiction in all matters not prohibited by law. . . ." Const. 1963, art. 6, 13. MCLA 600.601 provides a similarly broad grant of subject matter jurisdiction as follows:

> "(1) The circuit court has the power and jurisdiction:
>
> (a) Possessed by courts of record at the common law, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (b) Possessed by courts and judges in chancery in England on March 1, 1847, as altered by the state constitution of 1963, the laws of this state, and the rules of the supreme court.
>
> (c) Prescribed by the rules of the supreme court.
>
> (2) The circuit court has exclusive jurisdiction over condemnation cases commenced under the drain code of 1956, 1956 PA 40, MCL 280.1 to 280.630.
>
> (3) In a judicial circuit in which the circuit court is affected by a plan of concurrent jurisdiction adopted under chapter 4, the circuit court has concurrent jurisdiction with the probate court or the district court, or both, as provided in the plan of concurrent jurisdiction, except as to the following matters:
>
> (a) The probate court has exclusive jurisdiction over trust and estate matters.
>
> (b) Except as provided in section 411, the district court has exclusive jurisdiction over small claims and civil infraction actions.
>
> (4) The family division of circuit court has jurisdiction as provided

in chapter 10."

Michigan circuit courts are, therefore, courts of broad general jurisdiction over all matters, particularly civil, so long as jurisdiction is not expressly prohibited by law. *Office Planning Group, Inc. v. Baraga-Houghton-Keweenaw Child Development Bd.*, 472 Mich. 479, 495, 697 N.W.2d 871, 881 (2005); *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998); *Derderian v. Genesys Health Care Systems*, 263 Mich.App. 364, 375, 689 N.W.2d 145, 154 (2004). Accordingly, the subject matter jurisdiction of circuit courts is presumed unless expressly denied by constitution or statute. *People v. Goecke*, 457 Mich. 442, 458, 579 N.W.2d 868, 876 (1998); *L.M.E. v. A.R.S.*, 261 Mich.App. 273, 279, 680 N.W.2d 902, 907 (2004). Any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated. *Campbell v. St. John Hosp.*, 434 Mich. 608, 613-614, 455 N.W.2d 695, 697 (1990).

Neither MCLA 700.403 (now 700.5102) nor MCR 2.420 in any way deprived the lower court of subject matter jurisdiction to approve the settlement and enter an order of dismissal in this case.

First of all, it must be emphasized that MCLA 700.403 (now 700.5102), does not apply to this case. MCLA 700.403 was not intended to govern proceedings after a lawsuit had been commenced. Rather, MCLA 700.403 was intended to govern the settlement of a claim on behalf of a minor before filing of suit. Thus, at the time the settlement in the instant case, MCR 2.420(A) stated that "**[b]efore an action is commenced**, the settlement of a claim on behalf of a minor or in an incompetent person is governed by the revised Probate Code." (emphasis added). Accordingly, this Court has recognized that MCLA 700.403 does nothing more than delineate when a debtor of a minor may make payments directly to the minor's parents without seeking judicial approval. *Smith v. YMCA of Benton Harbor*, 216 Mich App 552, 555, 550 NW2d 262 (1996). Nothing in the wording of MCLA 700.403 in any way addressed the power and jurisdiction of circuit courts to

approve settlements or enter orders of dismissal.

Similarly, MCR 2.420 did not deprive the lower court to approve the settlement and enter an order of dismissal in this case. The court rule explicitly provides that the circuit court **may approve the settlement**, even if the probate court has appointed a next friend or conservator, but that dismissal shall not be entered until the probate court has passed on the sufficiency of the bond of the next friend or conservator. Even if the settlement exceeds $5,000, MCR 2.420 places no restriction on the power of the circuit court to approve the settlement. Rather, the rule merely states that, in that circumstance, a conservator must be appointed before entry of the order of dismissal. The rule does not suggest in any fashion that the non-appointment of a conservator deprives the circuit court of subject matter jurisdiction to enter an order of dismissal. Most importantly, MCR 2.420 does not **clearly and unambiguously** divest the circuit courts of jurisdiction to enter an order of dismissal before appointment of a conservator. *Campbell v. St. John Hosp.*, 434 Mich. 608, 613-614, 455 N.W.2d 695, 697 (1990)(any intent to divest the circuit court of jurisdiction must be clearly and unambiguously stated). Indeed, it would be quite illogical to deny the circuit subject matter jurisdiction to enter an order in a case pending before it, and which unquestionably fell within the class of cases that can be determined by circuit courts. At most, MCR 2.420 indicates that it would be error to enter the order before a conservator has been appointed, but as discussed above, an error in the exercise of a court's jurisdiction is not at all the same thing as a lack of subject matter jurisdiction.

ARGUMENT IV

THE PROVISIONS OF MCR 2.612(C)(1)(f) DO NOT ENTITLE THE PLAINTIFFS TO AN ORDER SETTING ASIDE THE DISMISSAL AND COMPELLING THE DEFENDANTS TO PAY THE SETTLEMENT AMOUNT A SECOND TIME.

A. Standard of Review

A trial court's decision on a motion to set aside a proceeding under MCR 2.612(C) is reviewed under the abuse of discretion standard. *Vestevich v. West Bloomfield Tp.*, 245 Mich. App. 759, 630 N.W.2d 646 (2001); *Trendell v. Solomon*, 178 Mich. App. 365, 369-370, 443 N.W.2d 509 (1989).

B. Analysis

The Plaintiffs/Appellants also argue that the provisions of MCR 2.612(C)(1)(f) entitle them to an order setting aside the dismissal and compelling the defendants to pay the settlement amount a second time. As the Court of Appeals correctly held in *Bierlein I*, however, the Plaintiffs/Appellants cannot satisfy the requirements for relief under MCR 2.612(C)(1)(f).

MCR 2.612(C)(1)(f) provides that the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the basis of "[a]ny other reason justifying relief from the operation of the judgment." Although this court rule does not specify the criteria to be used in granting relief under this rule, it has been generally recognized that, in order for relief to be granted under this subsection, three requirements must be fulfilled: (1) the reason for setting aside the judgment must not fall under MCR 2.612(C)(1)(a) through (e); (2) the substantial rights of the opposing party must not be detrimentally affected if the judgment is set aside, and (3) extraordinary circumstances must exist which mandate setting aside the judgment in order to achieve justice. *Altman v. Nelson*, 197 Mich.App. 467, 478, 495 N.W.2d 826, 831 - 832 (1992); *McNeil v. Caro Community Hosp.*, 167 Mich.App. 492, 497, 423 N.W.2d 241 (1988)(construing GCR 1963,

528.3(6), now MCR 2.612(C)(1)(f)).

Both this Court and the Court of Appeals have cautioned against an overly broad interpretation and application of MCR 2.612(C)(1)(f). *Alken-Ziegler, Inc. v. Waterbury Headers Corp.*, 461 Mich. 219, 234 fn 7, 600 N.W.2d 638, 645 fn 7 (1999); *Accord, Barclay v. Crown Building and Development, Inc.*, 241 Mich.App. 639, 654, 617 N.W.2d 373, 381 (2000). In *Alken-Ziegler*, this Court considered whether MCR 2.612(C)(1)(f) can be used as an exception to the requirements of MCR 2.603(D)(1), in order to set aside a default judgment. In that regard, this Court expressed the following caution in application of MCR 2.612(C)(1)(f):

> "We further note that MCR 2.603(D)(3) is available to prevent a manifest injustice. That rule empowers a court to set aside an entry of default and a judgment by default in accordance with MCR 2.612. MCR 2.612(C)(1)(f) states that a court may relieve a party from a final judgment for any reason justifying relief from the operation of the judgment. **However, we caution that the "any reason justifying relief" language should not be read so as to obliterate the analysis we have set forth regarding MCR 2.603(D)(1). Otherwise, the exception in MCR 2.612(C)(1)(f) could swallow the rule set forth in MCR 2.603(D)(1).**" *Alken-Ziegler, Inc. v. Waterbury Headers Corp.*, 461 Mich. 219, 234, 600 N.W.2d 638, 645 (1999).

The above quote is equally applicable to the context of the instant case. An overly broad interpretation of MCR 2.612(C)(1)(f) could swallow the rules specified in MCR 2.612(C)(1)(a)-(e). It was no doubt for this reason that a three pronged limitation has been recognized by the Court of Appeals in such cases as *Altman v. Nelson*, 197 Mich.App. 467, 478, 495 N.W.2d 826, 831 - 832 (1992) and *McNeil v. Caro Community Hosp.*, 167 Mich.App. 492, 497, 423 N.W.2d 241 (1988).

As the Court of Appeals noted in its opinion of January 20, 2004, the Plaintiff cannot satisfy the three elements necessary for granting relief under MCR 2.612(C)(1)(f). First of all, the Court of Appeals noted that if the Plaintiff next friend had filed a timely motion, she arguably could have sought relief under MCR 2.612(C)(1)(a), i.e., mistake. (January 20, 2004 Opinion of the Court of Appeals, at p. 3).

Secondly, Defendants' rights would be detrimentally effected if the satisfaction of the settlement was set aside. The Court of Appeals emphasized the unfairness of setting aside Defendants' satisfaction of the settlement (which the Plaintiff implicitly sought in the lower court, and now seeks in this Court) as follows:

> "**[D]efendants' rights would be detrimentally affected if the original satisfaction is set aside** since they relied on the court approved settlement for almost five years and have paid $55,000 to Samantha's next friend and attorney based on that court approval." (Appellant's Appendix, 137a)(emphasis added).

The Court of Appeals further noted that the result which the Plaintiffs now complain of were a result of the Plaintiff next friend's own actions:

> "The settlement here was on the record, the judge approved it, and the next friend agreed to the amount. Plaintiff was aware at that time that a conservator had not been appointed, and yet she still agreed to the settlement. When a party's own actions caused the result, courts are reluctant to grant that party relief under 2.612(C)(1)(f)." (Appellant's Appendix, 137a).

These observations are just as valid on the instant appeal as they were in *Bierlein I.*

The prejudice to the Defendants is further aggravated by Plaintiffs' apparent insistence that the Defendants be required to pay the settlement once again, without any set-offs. In *Commire v. Automobile Club of Michigan*, 183 Mich. App. 299, 454 N.W.2d 248 (1990), the Court of Appeals held that the first $5,000.00 was properly paid to the father (even though he had not been appointed as conservator), pursuant to MCLA 700.403. The Court therefore held that the Defendant in that case was entitled to a $5,000.00 credit.

The prejudice to the Defendants, and the lack of any extraordinary circumstances, is further demonstrated by the fact that the Plaintiffs/Appellants apparently has recourse against the bank which cashed the settlement draft. This is demonstrated by the case of *Coates v. Drake*, 131 Mich App 687, 346 NW2d 858 (1984). In that case, a Plaintiff's attorney settled a case without his client's

authorization or knowledge (a fact which does not exist in this instant case), forged the Plaintiffs' signatures upon the releases and settlement checks, and converted the settlement money to his own use. Although the Court of Appeals set aside the settlement because it was never authorized by the client, the Court also concluded that any recovery by the Plaintiffs against the bank which negotiated the check, and the Michigan Client Security Fund (now the Client Protection Fund of the Michigan State Bar), would be deducted from any award of damages the Plaintiffs obtained in their lawsuit against the Defendants. As indicated in the Appellees' Counter-Statement of Facts, Norma Bierlein, the Next Friend, was equivocal as to whether or not she had signed the settlement check in this case. Accordingly, on this basis, the minor child has a potential claim against the bank which negotiated the check, just like the Plaintiff in *Coates v. Drake*, *supra*. In the instant case, the Plaintiffs have consistently failed to acknowledge this potential source of recovery.

Moreover, like the Plaintiff in *Coates*, the Minor-Plaintiff is entitled to seek compensation from the Client Protection Fund of the Michigan State Bar. Indeed, in its July 26, 2001 Order, the trial court in the instant case explicitly stated that the conservator shall make application "to the Client Protection Fund with the State Bar of Michigan ..." (Appellees' Appendix, 24b).

Additionally, the Plaintiff would certainly have the right to recovery in either criminal or civil proceedings against her previous counsel for his criminal misconduct, either in criminal proceedings or civil proceedings. Here again, the Plaintiffs have failed to indicate any willingness to even provide the Defendants with any set-off for such a potential recovery, if the courts were to grant their requested relief.

Finally, as already alluded to above, the Plaintiff has not demonstrated extraordinary circumstances. The settlement was made on the record, and the next friend agreed to the amount. The Plaintiff was aware that no conservator had been appointed, but she nonetheless agreed to the settlement, and the satisfaction of that settlement(January 20, 2004 Opinion of the Court of Appeals,

at p. 3). Furthermore, the Plaintiff does have avenues of recovery against her prior counsel, the bank which cashed the settlement draft, and the Client Protection Fund of the State Bar of Michigan. Therefore, the Plaintiffs have failed to satisfy the elements necessary for relief under MCR 2.612(C)(1)(f).

Significantly, the precise arguments being raised by the Plaintiffs on the instant appeal were rejected by the Court of Appeals in another case, albeit unpublished. The case of *Makeya Miller v. Kwame Levelle Molette*, 2003 WL 21186587 (Mich App 2003)(Appellees' Appendix, 53b) was essentially on all fours with the instant case. Like the instant case, the *Miller* case was a personal injury action, arising out of an automobile accident. The minor-plaintiff was approximately four years old at the time of her injury in the accident. The lawsuit was filed on her behalf, and was ultimately settled for $85,000.00. The settlement was approved by the trial court, and the Defendants issued a check in settlement amount, made payable to the child's Guardian and the child's attorneys. The child's Guardian never attained Conservator status, because she failed to pay a $50,000.00 bond.

When the Plaintiff-Minor attained the age of majority, she learned that "no money existed." She filed a motion to re-open the file, and to vacate the satisfaction of the consent judgment, on the basis that the Defendants had tendered payment to the wrong party. Specifically, like the Plaintiff in the instant case, the Plaintiff in *Miller* claimed that the Defendants tendered the payment to her Guardian in violation of former MCR 2.420(B)(3), which allegedly required the payment to be tendered to the Conservator only. Although the Plaintiff challenged the validity of the Consent Judgment, she also sought an order for the Defendants to comply with the Judgment and pay her the settlement amount with interest. The Defendant opposed the motion, contending that they had satisfied the settlement properly and that they were under no duty to independently verify the probate proceedings in the underlying case. The Defendants further argued that it was the sole

responsibility of the Guardian and Plaintiff's counsel to ensure that the proper legal steps were taken prior to the entry of the Consent Judgment and the settlement payment. It was also the position of the Defendants that the settlement payment was deposited into the client trust account of Plaintiff's own attorneys, and that the proper distribution of the funds became their sole responsibility. Finally, the Defendants maintained that Plaintiff's remedy lay in a claim of legal malpractice against her former attorneys.

The trial court denied Plaintiff's motion on the basis that the Plaintiff was barred from simultaneously challenging the validity of the Judgment and seeking to enforce that same Judgment. The Plaintiff subsequently filed a Motion for Relief from the trial court's order, on the basis that her original motion intended only to challenge the Satisfaction of Consent Judgment, but in the alternative to vacate the Consent Judgment pursuant to MCR 2.612(C)(1)(a) and (f), and to enforce the mediation award which had previously been entered upon an appointment of a Conservator. The Plaintiff claimed that the original payment should be construed as non-payment on the basis that it failed to satisfy the Judgment pursuant to former MCR 2.420(B)(3). The trial court granted this motion on the basis that the payment was made in violation of former MCR 2.420(B)(3), and ordered the Defendants to repay that portion of the settlement, which was in excess of the Plaintiff's attorney fees and costs. The trial court also gave the Defendants a credit of $5,000.00, for that portion of the settlement amount which they were entitled to pay directly to the minor-plaintiff.

On a Motion for Reconsideration, the Defendants argued that Plaintiff's Motion to Set Aside the Satisfaction of the Judgment was untimely, because it was filed more than one year after the Judgment, in violation MCR 2.612(C)(2). The trial court denied this Motion for Reconsideration.

On appeal, the Court of Appeals reversed the trial court. The Court of Appeals noted that Plaintiff's Motion for Relief from Order could only have been considered under the provisions of MCR 2.612(C)(1)(a)-(c) and (f). The Court of Appeals also held that to the extent the Plaintiff was

relying upon subsections (a)-(c) of MCR 2.612(C)(1), the Motion for Relief from Order was time-barred pursuant to MCR 2.612(C)(2) because the motion was not filed within one year after the proceeding was entered. The Court of Appeals further held that the language of MCR 2.612(C)(2) does not carve out any exception for minors.

The Plaintiff also claimed, however, that she was entitled to relief from the settlement order pursuant to MCR 2.612(C)(1)(f), which allows a trial court to relieve a party from a judgment, order or proceeding for "[a]ny other reason justifying relief from the operation of the judgment." The Court of Appeals held that, in order to receive relief from a proceeding under this subsection, three requirements must be met: (1) the reason for setting aside the judgment must not fall under subsections (a)-(e), (2) the substantial rights of the opposing party must not be detrimentally effected if the judgment is set aside, and (3) extraordinary circumstances must exist that mandate setting aside the Judgment in order to achieve justice. *Miller, supra.* In support of these requirements, the Court of Appeals cited the cases of *Heugel v. Heugel*, 237 Mich App 471, 478-479, 603 NW2d 121 (1999) and *Altman v. Nelson*, 197 Mich App 467, 478, 495 NW2d 826 (1992).

The Court of Appeals concluded that the Plaintiffs failed to satisfy any of these elements. With regard to the first requirement, the Court of Appeals held that the Defendants alleged payment to the wrong party arguably fell within MCR 2.612(C)(1)(a), thus barring any relief under subsection (f).

Secondly, the Court of Appeals noted that the Defendants rights would be detrimentally effected if the original satisfaction of the settlement was set aside. The Court also noted that there was no evidence that the funds had been improperly applied. Of particular importance to this case, the Court of Appeals stated that "we are not persuaded that Plaintiff provided the trial court with any proof to support her argument that Defendants had the legal duty to ensure that [the Plaintiff's Guardian] properly effectuated her status as Conservator." *Miller, supra.* As support for this, the

Court of Appeals cited Dean & Longhofer, *Michigan Court Rules Practice*, section 2420.4, page 588, where the authors indicated that it was incumbent upon the *attorney for the minor* to take the additional steps to make sure that a conservator was appointed. *Miller*, *supra*.

Finally, the Court of Appeals held that the Plaintiff failed to demonstrate any extraordinary circumstances entitling her to relief. The Court noted that the Plaintiff was not without an adequate remedy at law, because she could still sue her attorneys for failing to fulfill their duty to secure the appointment of Conservator.

Accordingly, the Court of Appeals ruled that the trial court improperly vacated the original satisfaction of the Consent Judgment and improperly ordered Defendants to repay the Plaintiffs.

For all practical purposes, this case is on all fours with *Miller v. Molette* in all pertinent respects, and the rationale of *Miller v. Molette* is equally applicable to the instant case. Indeed, in *Bierlein I*, the Court of Appeals applied precisely the same line of reasoning to the instant case. The Plaintiff cannot obtain relief under 2.612(C)(1)(a)-(c), because Plaintiff's motion for relief was untimely. Moreover, the Plaintiff cannot meet all three requirements necessary for application of MCR 2.612(C)(1)(f). Finally, as in the case of *Miller v. Molette*, the Plaintiff has not provided this Court, the Court of Appeals or the trial court with any evidence to support the argument that the Defendants had the legal duty to ensure that Plaintiff's counsel properly fulfilled his obligation to secure the appointment of a Conservator.

For all of the foregoing reasons, Plaintiffs/Appellants cannot satisfy the elements necessary to relief under MCR 2.612(C)(1)(f), and they are therefore not entitled to relief under that rule. The Plaintiffs/Appellants have failed to present appropriate factual and legal support for the relief they request. The lower court and Court of Appeals properly refused to set aside Defendants' satisfaction of the settlement, and properly reinstated the dismissal of this matter.

ARGUMENT V

THE DISMISSAL IN THIS CASE OUGHT NOT TO BE SET ASIDE AND THE SETTLEMENT OUGHT NOT TO BE REOPENED PURSUANT TO MCR 7.316(A)(7).

MCR 7.316(A)(7) provides that this Court may "enter any judgment or order that ought to have been entered, and enter other and further orders and grant relief as the case may require." Defendants submit that this rule was only intended to granted such relief as could have been granted **in the proceedings appealed from**. On the instant appeal, the Plaintiffs are appealing from the lower court order reinstating the settlement. Defendants submit that this was the only order legally available to the lower court, and therefore the one that "ought to have been entered."

Michigan has a strong public policy in favor of enforcing settlements of litigation. *Groulx v. Carlson*, 176 Mich App 484, 489, 440 NW2d 644 (1999). Accordingly, Michigan courts are generally reluctant to set aside such settlements. *The Metropolitan Life Insurance Co. v. Goolsby*, 165 Mich App 126, 128, 418 NW2d 700 (1987). A settlement agreement is binding when it is made in open court MCR 2.507(H). An agreement to settle a pending lawsuit is a contract and is to be governed by legal principles applicable to the construction and interpretation of contracts. *Michigan Mutual Insurance Co. v. Indiana Insurance Co.*, 247 Mich App 480, 498 NW2d 205 (2001). It has been held that settlements should not be upset merely because of any hesitation or secret reservation on the part of either party. *Meyer v. Rosenbaum*, 71 Mich App 388, 393, 248 NW2d 558 (1976). In short, it is the policy of Michigan that parties should be entitled to rely upon a settlement that was entered on the record, expressly approved by the court, and satisfied by the Defendant. Allowing a court to set aside such settlements without a legally recognized basis supported by the record would severely impair the ability of Michigan courts and litigations to bring litigation to a full and final conclusion.

In the lower court, the Plaintiff repeatedly argued that the settlement should be set aside

because no conservatorship had been set up for the Minor-Plaintiff, and the settlement proceeds were apparently stolen by Plaintiff's counsel. Nonetheless, this was not a proper legal basis for setting aside a court approved settlement, nor would this be a proper legal basis for setting aside Defendants' satisfaction of that settlement. As the following discussion will demonstrate, the appointment of a conservator was not a condition precedent to Defendants' ability to satisfy and discharge their obligation under the settlement.

The Court of Appeals has held that a Next Friend or Guardian Ad Litem of an infant may give a binding assent to agreements which will facilitate the determination of a case, provided that the agreement has been approved by the court on a showing that it is for the best interests of the Plaintiff-Minor. *Plezanc v. Griva*, 86 Mich App 528, 533, 272 NW2d 712 (1978). Moreover, Michigan case law provides that a Next Friend has authority to receive payment and satisfy an award recovered by him or her in the name of the Minor-Plaintiff. *Denison v. Crowley, Milner, and Co.*, 279 Mich 211, 216, 271 NW 735, 737 (1937). Similarly, MCR 2.201(E)(3) recognizes that a Next Friend has authority to receive money awarded to a Minor-Plaintiff in a lawsuit. Although this rule also states that the Next Friend shall give security "as the court directs," the language of the rule does not state that it is mandatory for the court to order the posting of such security, nor does it state the amount of such security. Moreover, although the court in this case did not order the posting of such security, this does not mandate the conclusion that the Defendants had no right to satisfy the settlement by paying the Next Friend. Quite the contrary, any requirement of security was a matter for the trial court's discretion, and the lack of such security did not vest the Defendants with the right to refuse payment, nor did this situation create an obligation on the part of the Defendants to insist on the posting of such security.

Just as importantly, however, **the posting of a bond by the Next Friend in this case would not have had any benefit to the Minor-Plaintiff.** Again, this Court must keep in mind that it was

Plaintiff's previous attorney, **not the Next Friend**, who stole the settlement proceeds. If a bond was posted by the Next Friend, it would only have secured the **Next Friend's** performance of **her duties**. The bond would not have secured **Plaintiff's attorney's** performance of **his duties**. In other words, even if the Next Friend has posted a monetary bond, the Minor-Plaintiff would still be left without protection against the theft by Plaintiff's counsel. Accordingly, setting aside the settlement and Defendants' satisfaction of that settlement simply cannot be justified on the basis that the Next Friend did not give security.

Accordingly, to the extent that the Plaintiffs/Appellants may claim that the Next Friend did not have authority to receive payment of the settlement, and discharge Defendants' liability under that settlement, they are clearly incorrect.

Plaintiffs/Appellant's misapprehension in this regard appears to be based upon a misinterpretation of Michigan law. One of the provision relied upon by the Plaintiff in *Bierlein I* in the lower court was MCLA 700.403 (now 700.5102). At the time of the settlement in this case, this statutory provision stated as follows:

> Sec. 403. A person under a duty to pay or deliver money or personal property to a minor may perform this duty, in amounts not exceeding $5,000.00 per annum, by paying or delivering the money or property to the minor, if the minor is married; a parent or a person having the care and custody of the minor under a court order and with whom the minor resides; or a guardian of the minor. This section does not apply if the person making payment or delivery has actual knowledge that a conservator is appointed or if proceedings for appointment of a conservator of the estate of the minor are pending. The persons, other than the married minor receiving money or property for a minor, are obligated to apply the money to the support and education of the minor, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used and any property received for the minor shall be turned over to the minor when the minor attains majority. A person who pays or delivers pursuant to this section is not responsible for the proper application of the sums.

Based upon this statutory provision, Plaintiff argued that the Defendants did not properly pay the settlement in this case, and did not properly obtain a discharge of their liability under that settlement, because the lump sum settlement was in excess of $5,000.00 and no conservator had been appointed for the Plaintiff-Minor prior to the payment. The lower court's initial acceptance of this argument was erroneous, and was properly overturned by the Court of Appeals in *Bierlein I.* MCLA 700.403 was not intended to govern proceedings after a lawsuit had been commenced. Rather, MCLA 700.403 (now 700.5102) was intended to govern the settlement of a claim on behalf of a minor without judicial approval. Thus, at the time the settlement in the instant case, MCR 2.420(A) stated that "[b]efore an action is commenced, the settlement of a claim on behalf of a minor or in an incompetent person is governed by the revised Probate Code." Accordingly, the Court of Appeals has recognized that MCLA 700.403 does nothing more than delineate when a debtor of a minor may make payments directly to the minor's parents without seeking judicial approval. *Smith v. YMCA of Benton Harbor*, 216 Mich App 552, 555, 550 NW2d 262 (1996). Nothing in the wording of that statute precludes a Defendant from paying settlement proceeds directly to the minor's Next Friend, after the settlement has been approved by the trial court. Although the statute states that amounts not in excess of $5,000.00 can be paid directly to the child's parents, the statute does not purport to be the exclusive means by which a Defendant or potential Defendant can discharge his or her liability under a settlement. This statute certainly does not say that settlement proceeds cannot be paid to a Next Friend, after commencement of a civil action. Rather, the statute merely sets forth one general procedure that can be used to settle a controversy or an amount not in excess of $5,000.00 without court approval. The statute does not make a reference to the settlement of pending civil litigation, and does not purport to be the exclusive means by which to settle such controversies. In short, there is nothing in MCLA 700.403 which prohibits a Defendant from

discharging his or her liability under a settlement by paying the settlement amount to the minor's Next Friend, after the settlement has been approved by the court.

It is also significant that MCR 2.420(B)(4) makes reference to MCLA 700.403 (now 700.5102), but does not prohibit a Defendant from paying the settlement amount to the minor's Next Friend after approval of the settlement by the court. Rather, MCR 2.420(B)(4)(a) merely states that if the settlement or judgment requires payment of more than $5,000.00 to the minor in any single year, the trial court shall not enter judgment or dismiss the action until a conservator has been appointed by the Probate Court. There is nothing in this language which prohibits the Defendant from satisfying a settlement, and obtaining a full discharge of his or her liability under the settlement, before a conservator has been appointed. Indeed, there is no reason to prohibit such a payment and discharge, even prior to an appointment of a conservator. The reason for this is that the Next Friend is under the jurisdiction, and responsible to, the Circuit Court, with regard to the proper management of the settlement monies. In other words, at that point, there are three safeguards for the proper management of the settlement proceeds:

1. The trial court;
2. Plaintiff's counsel;
3. The parent/Next Friend.

Neither MCLA 700.403 nor MCR 2.420(B)(4)(a) were intended to make a Defendant accountable for the proper management of the settlement proceeds after the settlement has been properly approved and paid to the Next Friend. Specifically, MCR 2.420(B)(4)(a) spells out the responsibility of the trial court to make sure that a conservator has been appointed by the Probate Court before trial court closes its file. This court rule does not state that a Defendant has the duty, or even the right, to refuse to pay court-approved settlement merely because a conservator has not been appointed, in a circumstance where a Next Friend has been appointed for the minor. In short,

although MCR 2.420 states that the trial court shall not dismiss the action until a conservator has been appointed, the same court rule **does not prohibit a Defendant from paying the settlement amount, and obtaining a discharge of liability under the settlement, prior to appointment of a conservator**.

The case of *Commire v. Automobile Club of Michigan*, 183 Mich App 299, 454 NW2d 248 (1990), relied upon by the Plaintiff, is markedly distinguishable from this case, based upon the principles outlined above. In *Commire*, there is no indication that the original settlement was achieved in the context of a pending civil action, and the implication is that the parties reached a settlement without such a suit. Of course, given the fact that the claim was settled without a lawsuit, the settlement was also achieved without court approval. Again, this is distinguishable from the instant case, in which the court approved the settlement as being in the best interests of the minor.

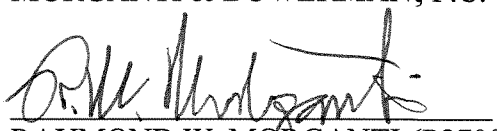
Accordingly, the lower court properly reinstated the settlement in this case. Within the meaning of MCR 7.316(A)(7), this was the relief that properly ought to have been granted.

RELIEF

For all of the foregoing reasons, Defendants/Appellees pray that this Honorable Court issue an order affirming the lower court's November 15, 2004 "Order Reinstating Dismissal Pursuant to Court of Appeals Opinion and Denying Plaintiff's Motion for Enforcement of Settlement."

Respectfully submitted,

SIEMION, HUCKABAY, BODARY, PADILLA, MORGANTI & BOWERMAN, P.C.

By: 

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